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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/023,865	12/21/2001	Gerald Delgorgue	P21708	5631

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EXAMINER

STASHICK, ANTHONY D

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 04/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	Application No. 10/023,865	Applicant(s) DELGORGUE ET AL.	
	Examiner Anthony Stashick	Art Unit 3728	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 December 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 6-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-3, 6-8, 11-14 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Kogert et al. 3,570,149. Kogert et al. '149 discloses all the limitations of the claims including the following: assembling an upper on the sole (see col. 1, lines 54-60); applying at least one layer of flexible or semi-rigid polymer in a liquid state in predetermined areas of the upper (see col. 2, lines 7-11); the predetermined areas are less than an entirety of the upper (where necessary can be any portion of the upper); drying the article of footwear (col. 2, lines 7-11, multiple layers can only be applied if the preceding layer has dried, otherwise not separate layers); less than the entirety of the upper having a polymer coat (the extra coating noted in col. 2, lines 7-11 does not coat the entire upper, therefore, the entire upper does not have this polymer coat); applying the polymer with a brush (see painting in col. 2, lines 12-13 and 22-24); applying the polymer by spraying (see col. 2, lines 12-13 and 20-24); liquefying the polymer by heating (col. 2, line 41); the polymer is made of polyurethane (col. 2, line 41); the upper comprises mesh material (textile material includes mesh material); upper comprises three-dimensional mesh material (multiple layers makes it three dimensional with a length, width and thickness); the material of the upper being aeratable (see col. 2, line 2, porous is aeratable); elastically

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compressible air space between layers of upper (an multiple layer of textile material will have air located between it as it consists of material and air spaces).

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 4, 9-10, 16-20, 24-26 and 34-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kogert et al, 3,570,149 as applied above in view of FR Lentz 720,292 (Lentz '292). Kogert '149 discloses all the limitations of the claims substantially as claimed except for the polymer layer straddling the sole and upper, the polymer layer varying in height along the length of the upper, the polymer layer raising in height along the rear of the upper. Lentz '292 teaches that a layer applied to the external side of a shoe can cover the shoe sole and upper with the layer varying in height along the upper from the front to the heel of the shoe (see Figure 3). Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to make the external layer of protective material vary in height from the front to the heel of the shoe while covering the sole and upper, as taught by Lentz '292, to the shoe of Kogert '149, to prevent entrance of fluid into the shoe between the upper and sole as well as to give added support to the user's foot when placed within the shoe.

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5. Claims 27-33 are rejected under 35 U.S.C. 103(a) as being obvious over Kogert et al. 3,570,149 as applied above. Kogert teaches that the outer coating material can be polyurethane. Applicant, in claim 7 of the instant application, admits that all the materials claimed in claims 27-33 are equivalents of polyurethane, at least in the properties desired for application to waterproof a shoe. Therefore, since the material of claims 27-33 are accepted equivalents of the polyurethane used by Kogert '149, Kogert '149 would anticipate the use of these materials.

6. Claims 15, 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claims 13 and 21 above in view of Burt 6,401,364. The references as applied to claims 13 and 21 above disclose all the limitations of the claims except for the aeratable material being made of a pair of spaced-apart layers of mesh fabric and a fibrous layer located between them with an air space. Burt '364 teaches that the breathable upper of a shoe can be made of an internal mesh layer 40 and an external mesh layer 20 (see col. 4, lines 35-60) with a reinforcing layer located in between. The reference states "the internal layer 40 is made of a three-dimensional mesh which is more comfortable to the wearer than mesh. The three-dimensional mesh is a loose configuration of fibers 42 extending substantially perpendicularly between a soft porous inner layer 41 and an outer porous layer 43, which provide a porous layer that allows gases, such as air, and liquids, such as perspiration, to travel ...". Therefore, Burt '364 teaches that the upper of a shoe can be made of a three-dimensional mesh layer with fibrous material (and air) located between the internal and external layers. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to make the

upper of the Kogert '149, out of the material suggested by Burt '364 to allow for a light and breathable upper to be reinforced and still be light in weight.

Response to Arguments

7. Applicant's arguments filed December 20 2004 have been fully considered but they are not persuasive. Applicant continues to argue that the entire upper of Kogert is coated with polyurethane. Specifically stated in Kogert in column 2, lines 7-11, it states, "a plurality of layers of compact porous polyurethane can be applied, **where necessary...**" (emphasis added). This shows that a layer of polyurethane can be applied to less than the entire upper. The rest of the upper would therefore meet the requirement that less than the entire upper having this particular polymer coating as required in the independent claims. The only requirement in the independent claims is that "thereby resulting in less than the entirety of the upper having a polymer coating." Kogert thereby meets this limitation since less than the entire upper has this particular polymer coating. If applicant wants to argue that the instant application only has one coating, then applicant should claim as much saying that less than the entire upper has a single polymer coating.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO**

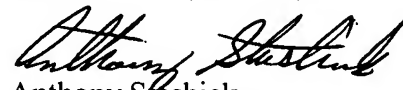
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MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Stashick whose telephone number is 571-272-4561. The examiner can normally be reached on Monday-Thursday 8:30 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on 571-272-4562. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Anthony Stashick
Primary Examiner
Art Unit 3728

ADS